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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1216 87

**THE PUBLIC UTILITIES COMMISSION OF OHIO,
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID COM-
MISSION, ET AL.,**

Appellants,

vs.

UNITED FUEL GAS COMPANY, ET AL.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.**

MOTION TO DISMISS OR AFFIRM.

✓ **HAROLD A. RITZ,
FREEMAN T. EAGLESON,**
Counsel for Appellee.

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**IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION**

In Equity. No. 1141.

UNITED FUEL GAS COMPANY,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, ET ALS.,

Defendants.

**MOTION OF UNITED FUEL GAS COMPANY, UNDER
RULE 12, PARAGRAPH 3, TO DISMISS THE AP-
PEAL ALLOWED OR IN THE ALTERNATIVE TO
AFFIRM THE JUDGMENT OF THE DISTRICT
COURT.**

Respondent, United Fuel Gas Company, moves to dis-
miss the appeal granted herein or to affirm the judgment
of the District Court.

Petitioner, Public Utilities Commission of Ohio, under-
took to regulate the rates at which this respondent was
selling natural gas to the Portsmouth Gas Company. (See
Exhibits E and G with the bill of complaint.) This suit
was instituted by this respondent for the purpose of en-
joining the said Public Utilities Commission of Ohio from
enforcing said order upon the grounds that the business

between it and the said Portsmouth Gas Company was interstate commerce and beyond the power of the petitioner, Public Utilities Commission of Ohio, to regulate. The case was heard in the District Court and an injunction granted, prohibiting said Commission, its members and agents, from enforcing said orders against this respondent, and this appeal is prosecuted from that judgment.

In their assignment of errors, the petitioners base their challenge to the judgment complained of on the ground that the commerce involved is not interstate, and that the parties to the contract involved in the case did not deal at arms length. These contentions are directly contradictory to the express finding of the Commission itself in its order of May 29, 1935, Exhibit G with the bill; and upon the facts found in this order the District Court expressly found that the delivery of this gas is clearly interstate commerce and that the parties are entirely separate and distinct from each other.

As stated in the opinion of the court below, the petitioners here upon the hearing conceded that the natural gas involved was interstate commerce. To say the least, it would seem inconsistent for petitioners now to challenge the judgment of the court because it accepted this concession.

In view of these specific findings by the District Court, it would seem that the claims that the petitioners make for reversal of the Judgment of the court below must fall.

This appeal should be dismissed, or in the alternative, the judgment of the court below affirmed, because the natural gas involved was interstate commerce and the regulation of it was beyond the power of the petitioner, Public Utilities Commission of Ohio.

Public Utilities Commission v. London, 249 U. S. 236;
East Ohio Gas Co. v. Tax Commission of Ohio, 283
 U. S. 465;

United Fuel Gas Company v. Hallanan, 257 U. S. 277;
Pennsylvania v. West Virginia, 262 U. S. 553;
State of Missouri, ex rel. Barrett, v. Kansas Natural Gas Company, 265 U. S. 298;
Peoples Natural Gas Company v. Public Service Commission of Pennsylvania, 270 U. S. 550;
Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U. S. 83.

The application of these cases to the facts found by the Commission and the District Court clearly justifies the conclusion of the Court that "in view of such relationship and the nature of the inquiry before the Ohio Commission, it is believed that the jurisdiction sought to be asserted falls outside the orbit of State regulation now permissible."

It is true that the granting or refusal of an injunction is to some extent discretionary with the Court of first instance.

Di Giovanni v. Kansas Fire Insurance Company, 296 U. S. 64;
Petroleum Company v. Public Service Commission of Kentucky, 304 U. S. 209.

This discretion of the trial court will not be disturbed unless there is clear abuse thereof. No such abuse appears in this case. To have permitted the Commission to enforce its order would have entailed the expenditure on the part of this respondent of a considerable sum of money in compiling matters of which the Commission could make no legal use, and the Court, therefore, very properly exercised its discretion to prevent such useless expenditures. The order of the Commission would have required this respondent to do a perfectly vain thing.

The court below discussed at some length the application of the Natural Gas Act to the situation and held that

the transaction involved fell within the jurisdiction of the Federal Power Commission. Regardless of the application of the Federal Natural Gas Act, the Court was justified in granting the injunction. That the commerce affected falls within the purview of the Federal Natural Gas Act is clear from recent decisions.

Federal Power Commission v. Natural Gas Pipe Line Company, decided March 16, 1942, 86 L. Ed. 699; *Illinois Natural Gas Company v. Central Illinois Public Service Company*, decided January 5, 1942, 86 L. Ed. 322.

Because the principles involved in this case have been so frequently decided by this Court in the decisions above cited, in accordance with the conclusion reached by the court below, it is respectfully submitted that the appeal should be dismissed, or in the alternative, that the judgment complained of should be affirmed.

HAROLD A. RITZ,

FREEMAN T. EAGLESON,

Attorneys for United

Fuel Gas Company.

